Mohamad Ali Hussainar v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO K-05–363 OF 2010
KN SEGARA, MOHTARUDIN BAKIAND LIM YEE LAN JJCA
15 MAY 2012

Criminal Law — Dangerous Drugs Act 1952 — Trafficking in cannabis — Convicted and sentenced to death — Appeal against — Custody and control of drugs — Whether established — Possession — Mens rea — Whether appellants had requisite knowledge — Whether trial judge misdirected in law or facts — Whether finding of trial judge warrant's appellate interference — Whether conviction justified

Criminal Procedure — Statement — Appellant's statement to custom's officer — Statement uttered in Tamil — Statement uttered while appellant not under arrest by customs — No caution administered to appellant at any time before he uttered those words — Whether admissible in law — Customs Act 1967 ss 101, 111 & 103

The appellant ('OKT1') was charged together with another accused ('OKT2') in the Alor Setar High Court for the offence of trafficking in 124,113.1g of cannabis, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'), punishable under s 39B(2) of the said Act. At the conclusion of the trial, OKT1 was convicted and sentenced to death. Meanwhile, OKT2 was acquitted and discharged without his defence being called. The respondent had not appealed against the acquittal of OKT2. In his defence, OKT1 sought to push the blame on to Ramli and incriminate Ramli, as the van was purportedly in the custody of Ramli for three days while in Hadyai, and that he was unaware of the existence of the ganja in his van. OKT1 was the registered owner of the van since 30 September 2003 and until his arrest on 6 April 2005. The only issue raised before this court was whether s 37A of the DDA was applicable when OKT1 was arrested by the customs officer upon entering into Malaysia. This issue was raised with particular reference to the fact that no caution had been administered to OKT1 at any time before he uttered in Tamil, 'ada sedikit ganja' and had gestured in the direction of the ceiling of the van, in response to a query whether he had any other goods in the van other than that already declared earlier, and on which he had been assessed customs duty. It was the defence contention that the admission, '*ada sedikit ganja*' was inadmissible in law and renders the conviction unsafe.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) The answer '*ada sedikit ganja*' by OKT1 was admissible as the custom

officer's question and conduct was permissible and consistent with the provisions of ss 101, 111, and 103 of the Customs Act 1967, that was, to detain (stop the vehicle), make enquiries and conduct examination (of the vehicle). At that point of time, OKT1 was not under arrest by the customs for the purpose of s 37A of the DDA and the issue of the non-admission of the caution was irrelevant. In any event, there was no assertion that the statement was made consequent upon any inducement, threat or promise by any of the customs officers and, in particular, SP6 (see paras 24 & 25).

(2) The indisputable evidence was that the van was in the custody and control of OKT1 at the material time. He was driving it alone with no other passengers. He had the requisite knowledge of the existence of the cannabis in the compartment of the air-con unit in the ceiling over the driver's seat. He was also the registered owner of the van since 30 September 2003. This court was in complete agreement with the trial judge that OKT1 had mens rea possession of the cannabis and not presumed possession (see para 26).

(3) Although OKT2 came on foot and introduced himself as OKT1's friend, he was never seen together with OKT1 in the van in which the cannabis was found. There was no nexus between the cannabis recovered from the compartment in the ceiling of the van and OKT2. Although there was no appeal from the public prosecutor before the court, the court took the liberty to observe that the trial judge had correctly acquitted OKT2 (see para 26).

(4) There was no enmity between SP6 and OKT1 or that they knew each other before the arrest. OKT1's response to SP6's enquiry was consistent with another customs officer's (SP5's) evidence that at the time the van was initially detained, there was the smell of cannabis originating from the interior cabin of the van. This was not surprising and totally credible, as the amount was large and placed in the compartment where the overhead air-con unit was located (see para 29).

[Bahasa Malaysia summary

Perayu ('OKT1') didakwa bersama-sama dengan seorang lagi tertuduh ('OKT2') di Mahkamah Tinggi Alor Setar bagi kesalahan pengedaran 124,113.1g ganja, suatu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'), yang boleh dihukum di bawah s 39B(2) Akta tersebut. Di akhir perbicaraan, OKT1 telah disabitkan dan dihukum mati. Sementara itu, OKT2 dilepaskan dan dibebaskan tanpa dipanggil untuk pembelaan. Responden tidak merayu terhadap pembebasan OKT2. Dalam pembelaannya, OKT1 cuba untuk menyalahkan Ramli dan menunjukkan kesalahan Ramli, kerana kononnya van berada dalam jagaan Ramli selama tiga hari ketika di Hadyai, dan bahawa dia tidak menyedari kewujudan ganja dalam

van tersebut. OKT1 adalah pemilik berdaftar van sejak 30 September 2003 dan sehingga penangkapannya pada 6 April 2005. Satu-satunya isu yang dibangkitkan di hadapan mahkamah ini adalah sama ada s 37A ADB adalah terpakai apabila OKT1 telah ditangkap oleh pegawai kastam apabila memasuki Malaysia. Isu ini telah dibangkitkan dengan rujukan khusus kepada fakta bahawa tidak ada amaran yang telah diberikan kepada OKT1 pada bila-bila masa sebelum dia mengucapkan dalam Bahasa Tamil, 'ada sedikit ganja' dan telah menunjukkan ke arah siling van, sebagai respons kepada pertanyaan sama ada dia mempunyai apa-apa barang lain dalam van selain daripada yang telah diisytiharkan sebelum ini, dan di mana dia telah dinilai bagi duti kastam. Adalah hujahan pembelaan bahawa pengakuan, 'ada sedikit ganja' tidak boleh diterima di sisi undang-undang dan menyebabkan sabitan tidak selamat.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Jawapan 'ada sedikit ganja' oleh OKT1 diterima kerana soalan dan kelakuan pegawai kastam adalah dibenarkan dan selaras dengan peruntukan ss 101, 111, dan 103 Akta Kastam 1967, iaitu, untuk menahan (memberhentikan kenderaan), membuat siasatan dan pemeriksaan kelakuan (kenderaan). Ketika itu, OKT1 tidak ditahan oleh kastam bagi maksud s 37A ADB dan isu ketakpengakuan beramaran adalah tidak relevan. Dalam apa jua keadaan, tidak ada dakwaan bahawa pernyataan tersebut dibuat berikutan dorongan, ugutan atau janji oleh mana-mana pegawai kastam dan, khususnya, SP6 (lihat perenggan 24 & 25).

(2) Bukti-bukti yang tidak dapat dinafikan adalah bahawa van adalah dalam jagaan dan kawalan OKT1 pada masa material. Dia telah memandu bersendirian tanpa penumpang lain. Dia mempunyai pengetahuan yang diperlukan mengenai kewujudan ganja dalam petak unit penghawa dingin di siling atas tempat duduk pemandu. Dia juga merupakan pemilik berdaftar van sejak 30 September 2003. Mahkamah ini bersetuju sepenuhnya dengan hakim bicara bahawa OKT1 mempunyai mens rea memiliki ganja dan bukan anggapan milikan (lihat perenggan 26).

(3) Walaupun OKT2 datang dengan berjalan kaki dan memperkenalkan dirinya sebagai kawan OKT1, dia tidak pernah dilihat bersama-sama dengan OKT1 dalam van di mana ganja ditemui. Tiada pertalian antara ganja yang diperolehi dari tempat letak barang di siling van dan OKT2. Walaupun tidak ada rayuan daripada pendakwa raya di hadapan mahkamah ini, mahkamah ini memilih kebebasan untuk memuat pemerhatian bahawa hakim bicara betul dalam membebaskan OKT2 (lihat perenggan 26).

(4) Tiada permusuhan antara SP6 dan OKT1 atau bahawa mereka mengenali satu sama lain sebelum penangkapan itu. Respons OKT1 ke

atas siasatan SP6 adalah konsisten dengan keterangan seorang lagi pegawai kastam ('SP5') bahawa ketika van pada mulanya ditahan, terdapat bau ganja datang dari dalaman kabin van. Ini tidak mengejutkan dan benar-benar boleh dipercayai, kerana jumlah tersebut besar dan diletakkan di dalam bahagian di mana terletaknya bahagian atas unit penghawa dingin (lihat perenggan 29).]

Notes

For cases on dagerous drugs in general, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 178–274.

For cases on legitimacy, see 5(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4698–4747.

Legislation referred to

Customs Act 1967 ss 101, 103, 111

Dangerous Drugs Act 1952 ss 2, 37A, 37(da)(vi), 39B(1)(a), (2)

K Viknesvaran (Viknes Ratna & Co) for the appellant.

Shoba Venu Gobal (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

KN Segara JCA (delivering judgment of the court):

[1] The appellant ('OKT1') was charged together with another accused ('OKT2') in the High Court, Alor Setar, for the offence of trafficking in 124,113.1g of cannabis at about 3.45pm on 4 December 2005 at Kompleks Bukit Kayu Hitam, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 (DDA), punishable under s 39B(2) of the said Act.

[2] OKT2 was acquitted and discharged without his defence being called but OKT1 was convicted and sentenced to death at the conclusion of the trial. The public prosecutor has not appealed against the acquittal of OKT2.

[3] The appeal by OKT1 before us was dismissed. We affirmed the conviction and sentence by the trial judge. There was no misdirection in law or in the finding of facts by the trial judge to warrant any appellate interference.

[4] The facts of the case as follows.

[5] The officers involved in this case are customs officers carrying out their duties under the Customs Act 1967 in relation to contraband and/or uncustomed goods. They are not police officers. They are essentially revenue officers. Sections 101, 103 and 111 'inter alia' of the said Customs Act empower them to make necessary enquiry, stop and search conveyances.

[6] On 6 April 2005, a customs officer, Jafri (SP4), who was on duty at the *unit pemeriksaan penumpang bas dan pejalan kaki*, Kompleks Imigresen Bukit Kayu Hitam, saw a van BCW 9020, driven by OKT1, coming from the direction of Thailand towards Malaysia. The van stopped. OKT1 showed the items he bought in Thailand. A tax of RM30 was levied on OKT1. He paid the tax. There was no one else inside the van.

[7] A customs officer from the narcotic section, Indra (SP5), then came and took possession of OKT1's passport. He directed OKT1 to move his van further ahead, while awaiting the arrival of another customs officer, Ganasan (SP6), from the narcotics section. SP6 arrived about five minutes later bringing along with him an instrument, called alpha six, for the detection of drugs.

[8] While SP5 and SP6 were making an examination of the van, a Malay man came up to the van. He was OKT2 who introduced himself as OKT1's friend. OKT2's passport was taken possession by the customs officers. SP6 continued examining the van using the alpha six. The examination was positive. According to SP5 and SP6 there was the smell of cannabis radiating from inside the van. SP6 asked OKT1 whether he carried goods other than those declared. OKT1 replied in Tamil, which in bahasa meant,'ada sedikit ganja'. He then gestured or pointed his lips towards the direction of the air-conduct on the ceiling of the van above the driver's seat.

[9] Subsequently, the preventive head of customs at Bukit Kayu Hitam, Azmy Mahmud (SP2) came to the van. SP2 instructed SP6 to open the ceiling above the driver's seat. There upon, several compressed slabs were seen concealed therein.

[10] OKT1, OKT2 and the van were taken to the custom's preventive store for further examination. A thorough examination of the van was conducted at the store. A total of 135 compressed slabs of plant material were retrieved from the compartment in the ceiling of the van. The compressed slabs, suspected to be cannabis, were seized.

[11] The seized slabs of plant material were analysed by the government chemist (SP10). SP10 confirmed they were cannabis within the definition of s 2 of the DDA 1952. Its weight was 124,131.1g.

[12] OKT1 was the registered owner of the van BCW 9020 since 30 September 2003 and until his arrest on 6 April 2005.

[13] Brieflly, the defence of OKT1 was as follows.

[14] He gave his evidence on oath. He testified he had rented his van to one Ramli at a monthly rental of RM1,600. There was neither documentary evidence nor was Ramli called by OKT1 to testify about this arrangement.

[15] On the night of 2 April 2005, OKT1 sent three Thai workers to Thailand with his van and Ramli accompanied him. On arrival at the Immigration Complex, Bukit Kayu Hitam on 3 April 2005 at about 12 noon, OKT1 picked up his friend, Zaharullizam bin Lamajid (SD3), as earlier arranged. SD3 wanted to see his girlfriend in Thailand.

[16] OKT1 together with Ramli and SD3 proceeded to Hadyai. OKT1 and SD3 stayed in the same hotel at Hadyai whilst Ramli took over the van BCW 9020 from OKT1 to carry on with his (Ramli's) business. Ramli was to fetch OKT1 and SD3 two days later (5 April 2005). However, Ramli did not turn up as promised.

[17] OKT1 and SD3 ran out of money. They went to the border town, Danok, and SD3 went across to the Malaysian side to withdraw money. SD3 then re-entered Thailand.

[18] It was only on 6 April 2005 that Ramli came to fetch OKT1 and SD3 from their hotel. He came to the hotel driving the van BCW 9020 together with a Thai worker. They then proceeded to Danok in the same van, driven by Ramli. Ramli purchased some goods at Danok town.

[19] On entering Malaysia, OKT1 took over the wheel of his van whilst Ramli, the Thai worker and SD3 went on foot to the immigration and customs check point.

[20] At the customs check point, the van was checked and examined. About 135 kilograms of ganja were recovered from the ceiling of the van. OKT1 was arrested.

[21] Upon seeing the van being examined by the customs, SD3 went to inquire what was the problem. SD3 was also apprehended. Ramli and the Thai worker absconded when they saw OKT1 and the van detained by the customs.

[22] In a nut-shell, OKT1 sought to push the blame on to Ramli and incriminate Ramli, as the van was purportedly in the custody of Ramli for three days while in Hadyai, and that he was unaware of the existence of the ganja in his van.

[23] The only issue raised before us by counsel for the appellant was whether

s 37A of the DDA 1952 is applicable when the appellant (OKT1) was arrested by the customs officer upon entering into Malaysia. This issue was raised with particular reference to the fact that no caution had been administered to OKT1 at any time before he uttered in Tamil, 'ada sedikit ganja' and had gestured in the direction of the ceiling of the van, in response to a query whether he had any other goods in the van other than that already declared earlier, and on which he had been assessed customs duty. It was the defence contention that the admission, 'ada sedikit ganja' is inadmissible in law and renders the conviction unsafe.

[24] We have considered the submission very carefully in the backdrop of the facts and circumstances of the case. We have also taken note that the trial judge, too, had deliberated on the issue and after discussing the relevant authorities and the law had correctly concluded that the answer 'ada sedikit ganja' by OKT1 is admissible as the custom officer's question and conduct is permissible and consistent with the provisions of ss 101, 111, and 103 of the Customs Act 1967, that is, to detain (stop the vehicle), make enquiries and conduct examination (of the vehicle). We are in complete agreement with him that at that point of time

[25] OKT1 was not under arrest by the customs for the purpose of s 37A of the DDA 1952 and the issue of the non- admission of the caution is irrelevant. In any event, there was no assertion that the statement was made consequent upon any inducement, threat or promise by any of the customs officers and, in particular, SP6.

[26] The trial judge has considered the defence of OKT1 very carefully. The indisputable evidence was that the van was in the custody and control of OKT1 at the material time. He was driving it alone with no other passengers at the material time. He had the requisite knowledge of the existence of the cannabis in the compartment of the air-con unit in the ceiling overhead the driver's seat. He was also the registered owner of the van since 30 September 2003. We are in complete agreement with the trial judge that OKT1 had mens rea possession of the cannabis and not presumed possession. Although OKT2 came on foot and introduced himself as OKT1's friend, he was never seen together with OKT1 in the van in which the cannabis was found. There was no nexus between the cannabis recovered from the compartment in the ceiling of the van and OKT2. Although there is no appeal from the public prosecutor before us, we take the liberty to observe that the trial judge had correctly acquitted OKT2.

[27] The amount of the cannabis was very large. When there is mens rea possession it is incumbent upon the accused to establish on a balance of probabilities that drugs in his possession (cannabis) is not for the purposes of

trafficking and thereby rebut the presumption of trafficking under s 37 (da)(vi) of the DDA 1952. This, OKT1 clearly failed to do when he attempted to incriminate one Ramli. It was never the defence of OKT1 that the drug was for his personal consumption.

[28] The existence of Ramli and the Thai worker were never put to the appropriate prosecution's witnesses in the course of the prosecution's case. It was raised for the first time in the defence by OKT1. The van having been in the possession of OKT1 for almost 11/2 years, OKT1's defence that the van was in the custody of Ramli in Hadyai was dubious an unconvincing.

[29] The trial judge had carefully considered OKT1's defence that he could not speak in the Tamil language so as to have uttered 'ada sedikit ganja' in Tamil to SP6, an Indian customs officer. The trial judge had made a finding of fact that there was no plausible reason for SP6 to concoct his version that OKT1 had answered his query in the Tamil language 'ada sedikit ganja' and at the same time OKT1 had pointed his mouth towards the ceiling of the van. There is no enmity between SP6 and OKT1 or that they knew each other before the arrest. OKT1's response to SP6's enquiry is consistent with another customs officer's (SP5's) evidence, that at the time the van was initially detained there was the smell of cannabis originating from the interior cabin of the van. This is not surprising and totally credible, as the amount was large and placed in the compartment where the overhead air-con unit was located.

[30] We are indeed satisfied that the trial judge had evaluated the evidence tendered by both the prosecution and the defence very carefully and had satisfied himself that the defence had not raised any reasonable doubt on the truth of the prosecution's case and that the prosecution has succeeded in proving its case against OKT1 beyond any reasonable doubt as charged.

[31] Appeal dismissed. Conviction and sentence affirmed.

Appeal dismissed and conviction and sentence affirmed.

Reported by Ashgar Ali Ali Mohamed